

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: LTDS CORPORATION, Complainant, vs. QWEST CORPORATION, Respondent.	DOCKET NO. FCU-03-51
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ORDER AFFIRMING PROPOSED DECISION AND ORDER

(Issued February 2, 2005)

STATEMENT OF THE CASE

On October 22, 2003, LTDS Corporation (LTDS) filed a written complaint against Qwest Corporation (Qwest) with the Utilities Board (Board). In its complaint, LTDS asserted its right to order and receive certain services pursuant to an interconnection agreement between LTDS and Qwest. In addition, LTDS requested payment of credits it claimed were due pursuant to the terms of the "Service Order Provisioning Commitment Missed" penalties in the interconnection agreement. Finally, LTDS sought whatever additional relief the Board deemed lawful and supported by the record.

On November 25, 2003, the Board docketed the proceeding as a formal contested case and assigned the docket to the Board's administrative law judge

(ALJ) to establish a procedural schedule, set a hearing date, and conduct the proceedings. A hearing was held in this docket on May 20 and 21, 2004.

Supplemental testimony and post-hearing briefs were filed by both parties on July 16, 2004, and reply briefs were submitted on August 6, 2004.

On October 22, 2004, the ALJ issued a proposed decision stating that it was improper for Qwest to have denied LTDS's service order. The proposed decision also stated that LTDS was not entitled to recovery of damages because credits pursuant to the interconnection agreement were not applicable and LTDS "did not plead, prove, nor request a common law contractual damages remedy." (Proposed Decision, p. 71).

Subrule 199 IAC 7.8(2) requires that appeals from a proposed decision of the ALJ be filed within 15 days of the date the decision is issued. An appeal was timely filed by LTDS on November 5, 2004. LTDS did not request an opportunity to file briefs in this appeal. Qwest filed a response to the appeal on November 19, 2004. Qwest's response included a brief in resistance to LTDS's appeal.

On November 29, 2004, LTDS filed a "Motion for Leave to File Reply Brief in Support of Appeal" and attached to the motion a reply brief. In support of that motion, LTDS states that Qwest's brief raises a number of points that require response.

On December 1, 2004, Qwest responded to LTDS's motion, requesting that the Board disregard LTDS's reply brief. In support of its request, Qwest states that LTDS did not request additional briefing in this proceeding and that Qwest did not

fully brief the issues, but rather limited its response to the specific allegations in LTDS's appeal.

The Board finds that no party will be prejudiced by accepting LTDS's reply brief. Therefore, the reply brief filed by LTDS on November 29, 2004, is accepted.

Pursuant to 199 IAC 7.8(2)"d," on November 23, 2004, the Board issued a ruling identifying the issue to be decided on appeal as "whether LTDS is entitled to damages."

Summary of Arguments

LTDS asserts that the ALJ erred in refusing to award damages to LTDS. Specifically, LTDS states that Qwest willfully violated the provisions of the interconnection agreement and, as a result, LTDS should have received an award of damages either measured by the credits provision of the interconnection agreement or on the evidence of other damages, including contract damages.

Qwest responds by stating that the ALJ's proposed decision denying damages to LTDS was correct. Qwest maintains that the record does not support an award of damages pursuant to the interconnection agreement and that LTDS did not plead, provide, or request common law contractual damages and, therefore, is not entitled to them.

Summary of Relevant Facts

The issue is whether LTDS is entitled to damages. The relevant record in this case, with respect to that issue, is small and can be summarized as follows: First, LTDS's petition filed on October 22, 2003, seeks damages based on the language of

the interconnection agreement. Specifically, LTDS sought a credit of \$2,500 per day pursuant to the "Service Order Provisioning Commitment Missed" section of the interconnection agreement. The petition also included more general language on page 7 asking that the Board "grant any additional relief . . . as the Board deems lawful and supported by the record." (LTDS Initial Brief, p. 7).

Second, at the start of the hearing in this proceeding, during a review of the disputed issues in this case, LTDS's attorney stated:

[W]hat our complaint is seeking is not expressly a tort-like money damage to be mitigated, but rather is the liquidated credit value provided for in the contract under which we're claiming.

(Tr. 15.) Third, during the course of the hearing, the ALJ asked that LTDS witness Magill provide specific dollar amounts and supporting evidence of any damages that LTDS suffered as a result of Qwest's actions. LTDS's attorney then stated:

This is not our theory of the case, and so that would be why we have not supported it to date.

Our theory is that there is a contractually provided liquidated damage level provided as a credit. This issue has come up on two respects, in Qwest arguing that somehow we had options that were economically better, and we had an obligation to take and mitigate, and as to what the actual value was of those other options, the delay is relevant. And to the extent that Your Honor is asking presumably how we were damaged, what are we out, I think Mr. Magill has said he's not sure, and then went on to answer the question as best he could.

(Tr. 127.)

Fourth, LTDS's witness David L. Magill testified that it was his understanding that LTDS was seeking as damages only the credits that LTDS claims were due

under the interconnection agreement. (Tr. 140.) The transcript reflects the following testimony:

Mr. Goodwin [Qwest's attorney]: About the numbers that you were talking about with the Administrative Law Judge, you're not asking the Board or the Judge here to make - - to award you any damages because you had to spend extra money for the circuits or because you lost customers, are you?

Mr. Magill: That's correct.

Mr. Goodwin: You're just asking for the credits that you claim are due under the - - under the contract, Attachment 11, Appendix A, which is Exhibit 107 to your testimony?

Mr. Magill: Correct.

Mr. Goodwin: So in a hypothetical situation, if the Judge decides that you weren't entitled to the dedicated transport that you ordered, Qwest would win and be - - and there would be no award, correct?

Mr. Magill: Correct.

Mr. Goodwin: And if the Judge decided the other way, and decided that Qwest was entitled to the dedicated transport - - excuse me - - that LTDS was entitled to the dedicated transport, then in your mind you're asking the judge to make a determination as to whether or not a service - - Turn to Exhibit 107.

Mr. Magill: Yes.

Mr. Goodwin: In that case, if the Judge decides that Qwest should have provided the dedicated transport you ordered, then the Judge has to decide whether or not a service order provisioning commitment was missed as outlined in the first row of the table?

Mr. Magill: Correct, yes.

Mr. Goodwin: And if she decides that there wasn't, then you're not asking - - if she decides that there wasn't a service order provisioning commitment missed, you're not asking the Board or the Judge for any remedy, right?

Mr. Magill: Correct.

(Tr. 140-41.)

Fifth, the only testimony or evidence that LTDS cites on appeal to support a claim for common law contract damages is found in Exhibit 114 and on pages 125 and 126 of the transcript, where LTDS's witness offered estimated losses suffered by LTDS as a result of the rejected order.¹ LTDS, however, did not seek to support a common law breach of contract claim in its post-hearing exhibits and did not offer any specific support for any damage calculations or estimates.

Sixth, the ALJ found that Qwest breached the contract between Qwest and LTDS, but that LTDS did not plead or prove common law contract damages. (Proposed Decision, p. 68). The ALJ determined that the plain meaning of the contract between LTDS and Qwest indicated that credits are due only if there is a service order provisioning commitment missed. (Proposed Decision, p. 67). The ALJ found that in this case Qwest never committed to provision LTDS's order and therefore, there was no missed commitment. (Proposed Decision, p. 67). As there was no missed commitment, the credits provision of the agreement did not apply. (Proposed Decision, pp. 67-68).

¹ In its "Appeal of Proposed Decision," LTDS cites only to pages 125 – 126 of the transcript and Exhibit 114 in paragraph 15 as evidence in support of its argument that: "LTDS presented evidence showing the actual damages in this case as Qwest denied LTDS' lawful order and forced LTDS to incur additional expenses configuring alternative transport."

ANALYSIS

1. Did LTDS plead a breach of contract claim?

LTDS relies, in part, on the argument that Iowa Rule of Civil Procedure 69(a), which prescribes notice pleading, does not require a petition "to identify a specific theory of recovery if it informs the defendant of the incident out of which the claim arises and gives fair notice of the general nature of the claim." Engstrom v. State, 461 N.W.2d 309, 313 (Iowa 1990), citing Davis v. Ottumwa YMCA, 438 N.W.2d 10, 13 (Iowa 1989). Therefore, a plaintiff's petition in civil court is not required to state the precise amount of damages suffered; stating the basic elements of the claim is enough to satisfy the notice pleading standard. City of Dubuque, et al. v. Iowa Trust, et al., 519 N.W.2d 786, 790 (Iowa 1994).

Iowa Code § 17A.12 (2003) in contrast, requires that in a contested case all parties shall be afforded an opportunity for hearing after receiving reasonable notice. Section 17A.12(2)"d" states that the notice shall include a short and plain statement of the matters asserted. If a participant is unable to state the matter in detail at the time the notice is served, § 17A.12(2)"d" also states that the initial notice may be limited to a statement of the issues involved and then a more definite and detailed statement shall be furnished. In this proceeding, the notice of hearing referred to LTDS's petition for the statement of issues:

The issues in this case generally involve the request for the products and services listed in the complaint made by LTDS to Qwest on May 22, 2003, and the subsequent action by both parties. Details of the issues are contained in the complaint filed by LTDS and the answer filed by Qwest. Other issues may be raised by the parties prior to the hearing.

"Order Establishing Procedural Schedule and Notice of Hearing," December 1, 2003, p. 3.

Pursuant to Iowa Rule of Civil Procedure 69(a) and the Iowa Supreme Court's liberal interpretation of notice pleading, LTDS's initial petition may have met the civil case standard through its use of general language asking for whatever additional relief the Board deemed lawful and supported by the record. However, it is not clear that that standard is sufficient in an administrative proceeding. Iowa Code § 17A.12 requires somewhat more when providing notice of hearing.

In this proceeding, LTDS's petition regarding the issues of damages may be described as ambiguous, at best. Qwest attempted to clarify these issues in its answer when it asserted that LTDS was not seeking law damages; LTDS did not dispute Qwest's clarification or seek to add issues, as permitted by § 17A.12(2)"d" and page three of the "Order Establishing Procedural Schedule and Notice of Hearing" issued December 1, 2003. Instead, at the beginning of hearing, counsel for

LTDS clearly limited the case to a claim for "liquidated credit value provided for in the contract."² As such, the Board finds that a common law breach of contract claim was not sufficiently pleaded by LTDS during the course of this proceeding under the standards of § 17A.12.

2. Was the evidence sufficient to prove LTDS's claim for common law contractual damages if the claim had been properly raised?

The Board recognizes that if the civil procedure notice pleading standard is applied, LTDS's petition may have been minimally adequate to raise the issue of common law contract damages. The Board will, therefore, consider the extent of the evidence offered by LTDS as well.

LTDS did not provide any firm evidence that would support common law contractual damages in its pre-filed testimony, nor did LTDS attempt to support any specific damage figures in its pre-hearing pleadings or briefs. The only testimony or evidence cited by LTDS or found in the record that might support LTDS's claim for common law contractual damages is found in Exhibit 114 and on pages 125 and 126 of the transcript, where LTDS witness Magill estimated LTDS's alleged financial losses:

² Note: The Board gives little weight to the testimony of LTDS's lay witness Magill regarding the scope of its legal claims. The testimony is entitled to some weight; Qwest had the right to try and determine scope of LTDS's claim for damages through cross-examination and LTDS had the opportunity to clarify its position during re-direct examination. If the pleadings and prior course steered by LTDS during this proceeding had clearly stated that it was seeking a claim for common law damages, this lay testimony would not be sufficient to overcome the pleadings, but when the lay testimony is consistent with LTDS's, prior statements and actions, and when LTDS could have, but did not, clarify on re-direct, the lay testimony is entitled to some weight as additional evidence of LTDS's approach to this case.

The ALJ: Can you give me some specific dollar amounts and the basis for those dollar amounts for each of the items that are listed in that paragraph?

Mr. Magill: The payments to INS were \$1200 a month for four T1s, including entrance facility, and then traffic back to Fairfield a few dollars more probably.

The new path, I don't have a price on the new path. We're paying for a DS-3. Our monthly costs for the DS-3 is \$2500 a month, plus I think it's about \$300 a month for the Qwest unbundled fiber that we have in Burlington.

So we're paying probably \$2800, but we have 28 T1s for that, so as we grow in Burlington, that will become a more efficient way since it comes to a hundred dollars for a T1, but we're paying \$2800 instead of the 190 times four. It comes to 490, times four, including the INS portion. And then the main cost would be the loss of revenue and not being able to get into Burlington for those five months. If our entire curve of attracting customers in Burlington is delayed for five months, then for five months at the peak of that curve we no longer - - we're not able to gain that revenue, which could be from - - on the order of probably 100 to 150 thousand dollars a month.

The ALJ: What is the basis of that figure?

Mr. Magill: That would be taking the level we had at Fairfield, that penetration of 1100 or, say, a thousand lines, and then multiplying it by three, because we have three times the population in Burlington as we have in Fairfield, and then multiplying that by \$40 a line, which we expect to get.

(Tr. 125-26.) The figures provided in the testimony are estimates that cover substantial ranges. There is no supporting evidence. The witness says some costs are "probably" a state amount; he "thinks" another cost is "about" \$300 per month; he says "we're paying probably \$2800"; and then he estimates lost revenue by

multiplying a penetration level from a different exchange, achieved over an unknown time period, by an unsupported (but "expected") revenue level. Not surprisingly, LTDS does not attempt to reduce this mix of estimates and guesses to a specific figure. The Board will not attempt it either.

The record demonstrates that LTDS repeatedly suggested throughout the proceeding that its claim for relief rested on the credits available as liquidated damages pursuant to the interconnection agreement. LTDS states that "the nature of Qwest's violation means that actual damages can never be known with certainty." (LTDS Reply Brief, p. 6). Accepting this statement as true, LTDS still did not attempt to establish any actual damages in this docket with reliable supporting evidence, despite having several opportunities to do so. Therefore, the Board finds that LTDS did not prove a claim for common law contract damages in this proceeding.

LTDS argues that it would be bad policy for the Board to allow Qwest to breach the interconnection agreement and then not pay LTDS damages for that breach. However, it would be equally bad policy to let parties try their case on one theory, then change to a different basis after the hearing has concluded. Qwest made reasonable attempts to clarify its understanding that common law contract damages were not at issue in this proceeding and LTDS did essentially nothing to alter that understanding. It would be poor public policy to let a plaintiff mislead a defendant, even unintentionally, with an initial pleading, an opening statement, and testimony identifying only one theory for relief, and then, after the hearing, claim another basis.

If the Board were to conclude that LTDS pleaded and offered evidence sufficient to support common law contract claim, the Board would still be unable, on this record, to determine a specific amount of damages. The proceeding would have to be remanded to the ALJ for further review of additional evidence. This demonstrates that this case was not tried on a common law damages theory. There is no reason, on this record, to give LTDS two bites at the apple.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The proposed decision and order issued by the administrative law judge on October 22, 2004, is affirmed as provided in this order.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 2nd day of February, 2005.